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# **The Elective and Automatic Theories of Termination at Common Law: Resolving the Conundrum?**

David Cabrelli and Rebecca Zahn

## **1. INTRODUCTION**

Under general contractual principles, if one party commits a repudiatory breach of contract, the other party is entitled to either terminate or affirm the contract.<sup>1</sup> However, there has been a long-standing debate as to whether the same elective principles apply in relation to the employment contract or whether the law ought to prefer a theory based on automatic termination which posits that one party's unilateral repudiatory breach operates automatically to bring the contract of employment to an end. Different approaches have been tried and tested in England and Scotland which have resulted in the common law being in an unsatisfactory state as it currently stands. The Supreme Court has the opportunity to bring clarity to this area of the law in the upcoming case of *Geys v Société Générale, London Branch* which was decided by the Court of Appeal on 30 March 2011.<sup>2</sup> Leave to appeal to the Supreme Court was granted on 1 November 2011.

After briefly outlining the facts of, and decision in, the case, this note discusses the automatic and elective theories of termination of the employment contract in light of recent case law. There are persuasive arguments in favour of both theories of termination. For example, proponents of the elective theory invoke various policy reasons to favour the innocent party. However, although the elective theory accords with general contractual principles, it fails to reflect reality in the context of an employer's wrongful dismissal of an employee in repudiatory breach of contract, which effectively terminates the contract of employment. In one case, the Court of Appeal tried to find a middle ground based on the elective theory by inferring the automatic acceptance of the breach on the part of the employee. Thus, there seems to be a general preference at common law for the elective theory, albeit in a mutated form. This can be contrasted with the statutory unfair dismissal regime in Part X of the

Employment Rights Act 1996 ('ERA') which follows an altogether divergent path. Here, the automatic theory is applied in order to determine the date of termination of the employment contract.<sup>3</sup> Arguments in favour of the automatic theory—consistent with the view that a contract of employment cannot survive wrongful dismissal—rely inter alia on the general absence of specific remedies in English law: since there is a presumption against the award of specific performance or injunctive relief in the context of the actual or threatened dismissal of an employee, it is argued that it is problematic to treat the employment relationship as continuing where the employer's dismissal is in repudiatory breach. Nevertheless, differences of opinion emerge at this stage between the Scottish and English positions, given the former jurisdiction's lack of hostility to granting decrees of specific implement or interdict.<sup>4</sup> This case note uses the decision in *Geys v Société Générale, London Branch* as the pretext to engage in a wider analysis of these arguments, with a view to suggesting which theory of termination is doctrinally sound and most desirable from a policy perspective.

## **2. FACTS OF THE CASE**

Mr Geys was employed by the London Branch of Société Générale ('the Bank') from February 2005 onwards as the Managing Director of its European Fixed Income Sales, Financial Institutions Division. In November 2007, he was informed at a meeting that the Bank had decided to terminate his employment contract with immediate effect. Correspondence between the Bank and Mr Geys's solicitors followed between November 2007 and January 2008 which sought to clarify the amount of money offered to Mr Geys as payment in lieu of notice. The dispute centred on the exact date of termination of the employment contract and the amount of money due to Mr Geys as a result of the termination with immediate effect. The matter was complicated by the fact that termination of the employment relationship was governed by conflicting provisions in Mr Geys's employment contract and the Bank's Staff Handbook. Much of the Court of Appeal's judgment focuses on the effective date of termination of the contract for the purposes of calculating the sum payable to Mr Geys. However, at the outset of his judgment, Rimer LJ also addressed whether the Bank's repudiatory breach of contract, by summarily dismissing Mr Geys in November 2007, terminated his employment

contract. This case note restricts itself to consideration of this aspect of the judgment.

Rimer LJ followed the precedent set in *Gunton v Richmond-upon-Thames London Borough Council*<sup>5</sup> and confirmed in *Boyo v Lambeth London Borough Council*<sup>6</sup> by holding that ‘an unaccepted repudiation of a contract of employment does not automatically terminate it’.<sup>7</sup> He did however give the Bank ‘permission to appeal on that ground, solely to enable it to keep open the possibility of an appeal to the Supreme Court to re-consider this area of the law’.<sup>8</sup> The Supreme Court have now been afforded the opportunity to consider this issue, which it is submitted is one of the most pressing questions that remains unresolved in the common law of the termination of the contract of employment. Indeed, this sentiment has been echoed at the highest level of the judiciary, with Baroness Hale recently referring to it as an ‘important point’.<sup>9</sup>

### **3. ‘ELECTIVE’ VERSUS ‘AUTOMATIC’ THEORY OF TERMINATION**

#### **A. Current Debates in the Case Law**

There are many authorities which endorse the applicability of the ‘elective’ theory of termination which directs that an employer’s repudiatory breach of contract must be accepted by the employee before it is treated as effective to terminate the employment contract. This is especially the case where the employer has unilaterally varied the terms of the employment contract in repudiatory breach.<sup>10</sup> Therefore, confronted by the employer’s repudiatory breach of the contract of employment short of dismissal, the ‘elective’ theory of termination furnishes the employee with a choice. He/she is required to decide whether to accept the breach and claim damages for constructive wrongful dismissal at common law or to affirm the contract so that it continues in existence and/or seek damages. This ‘elective’ approach accords with orthodox principles of contract law and is generally accepted as preferable over the competing ‘automatic’ theory of termination.

However, in its conception, the 'elective' theory is at odds with factual reality in that the outright wrongful dismissal of an employee in repudiatory breach of contract by the employer *de facto* functions to terminate the employment relationship without any election on the part of the employee.<sup>11</sup> Indeed, there are a number of authorities which suggest that the employer's unilateral act of dismissal operates automatically to bring the contract of employment to an end.<sup>12</sup> The decision of the Court of Appeal in *Gunton v Richmond Upon Thames*, which was reluctantly followed by the Court of Appeal in *Boyo v LB of Lambeth* seeks to find a middle ground between the two theories of termination. In *Gunton*, Buckley LJ sought to reconcile wrongful dismissal with the elective theory of termination by holding that an employee's acceptance of an employer's wrongful dismissal in repudiatory breach of contract would be 'readily inferred' meaning that little, if any, manifestation of acceptance would be necessary on the employee's part. The idea behind 'readily inferred acceptance' is that there is usually no room for debate about whether an employer's repudiation has been accepted by the employee once he/she has been dismissed, and so it will be presumed. However, the practicability and desirability of a general rule in favour of 'readily inferred acceptance' was subsequently doubted by Ralph Gibson LJ and Staughton LJ in the Court of Appeal decision in *Boyo v London Borough of Lambeth*<sup>13</sup> who both favoured a requirement for 'real acceptance'. Although the House of Lords in its post-*Gunton* decision in *Rigby v Ferodo Ltd*<sup>14</sup> evinced a preference for the elective theory of termination, Lord Oliver was at pains to 'leave aside...the extreme case[s] of outright dismissal or walk-out [by the employee]'.<sup>15</sup> One is left with the distinct impression from the discussion in these cases that the judiciary are grappling to find the requisite conceptual materials and techniques which would enable them to reach the preferred result, namely that the elective theory is applicable in a wrongful dismissal context.

On balance, despite a degree of oscillation between the two theories, the case law now points towards a general preference for the elective theory of termination over the automatic theory.<sup>16</sup> Nonetheless, there is a genuine debate as to whether that is the most desirable result. At the heart of the debate lies a question as to what legal effects the common law of the contract of employment ought to attribute to a repudiation. The issue has been influenced by one important factor, namely the remedies available for a breach of the employment contract. The restrictive nature of the common law

remedies available to a dismissed employee has exerted a positively beguiling influence over the rights afforded to an employee when the employer is in repudiatory breach of contract.<sup>17</sup> In general, injunctive relief to prevent the termination of the contract of employment or an order for specific performance of the contract of employment is not available<sup>18</sup> and it is argued that this provides support for the contention that the contract is unable to survive an employer's repudiatory dismissal. Since the contract of employment cannot continue subsequent to a wrongful dismissal in repudiatory breach, the 'remedies/rights' argument posits that the 'automatic' theory of termination must reign supreme. Indeed, something akin to a symbiotic relationship has arisen between the rights afforded to the parties on termination of the employment contract under the common law of the contract of employment and the remedies available for its breach, which has been criticised by Ewing:

[However,] the argument is hopelessly circular. For not only does the absence of a remedy deny the right, but the fact that a contract is automatically terminated by the employer's conduct would make it difficult to develop equitable relief to restrain the employer from acting in breach of a contract which no longer exists. Not only are remedies and rights in this context 'inextricably bound together'; the absence of one both requires and is required by the absence of the other. As McMullen points out, this approach is to formulate a rule about termination from a rule about remedies.<sup>19</sup>

Indeed, of itself, the presumption in English law against specific remedies in the employment context is particularly controversial. The oft-versed justifications for the hostility to injunctive relief<sup>20</sup> include the assertions that damages are an adequate remedy in respect of a contractual breach, that an injunction compels an employer to continue to retain the employee in employment and provide him/her with work against its will where trust and confidence may well have irretrievably broken down, and that it is impractical for the court to supervise any order for specific performance or injunctive relief.<sup>21</sup> Nonetheless, the thaw in the judicial attitude towards the possibility of injunctive relief over the past 50 years or so<sup>22</sup> is reflective of the fact that these arguments are not as prescient or relevant as they once might have been. For example, in light of the low levels of damages awarded<sup>23</sup> it is stretching matters to contend that such a remedy is truly adequate in the case of a contractual

breach. Further, the courts routinely grant injunctive relief to enforce negative post-termination restrictive covenants in employment contracts, so it is unclear why injunctive relief should not be available in a wider context, for example to prevent an employer from defectively applying the provisions of a disciplinary procedure expressly incorporated into an employee's contract of employment. The recent decision of the Supreme Court in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*<sup>24</sup> has also eroded the argument that damages are an adequate remedy where such a contractual disciplinary procedure is in play. Here, it was held that where there is an irregularity in the employer's execution of an expressly incorporated disciplinary procedure, unless expressly agreed to the contrary, the employee will not be permitted to avail him/herself of a damages remedy where the claim relates to the manner of the employee's dismissal. The effect of that far-reaching decision is that in many cases involving the employer's failure to adhere to the provisions of a contractual disciplinary procedure, injunctive relief will now be the only realistic remedy available to the employee to uphold his or her private contractual rights so that the employment relationship operates in accordance with the freely agreed contractual terms. Following the decision in *Edwards*, it could therefore be expected that applications for injunctive relief will become more commonplace. It is also relevant to point out that certain jurisdictional divergences in the UK have a bearing on the relevance of the remedies/rights argument in the context of the termination of the employment contract. Writing in relation to Scots law, Brodie has cogently argued that 'it would appear to be contrary to principle, at least in this jurisdiction [Scotland] to allow a limitation in remedies to be used to negate a right' and goes on to state that 'the elective termination theory has the advantage that it does not seek to argue backwards from the law on remedies (a stance that would be particularly inappropriate in Scotland where the general approach is that where there is a wrong an appropriate remedy should be given).'<sup>25</sup> Here, Brodie is referring to the greater willingness of the Scottish courts to grant specific remedies such as decrees of interdict to prevent the termination of the contract of employment and specific implement to compel performance.<sup>26</sup> In Scots law, there is no presumption against injunctive relief and therefore no inherent limitation in the remedies available for a repudiatory breach of the contract of employment which can be used as justification for the automatic theory.

## **B. A Critique of the Current Position: Arguments in Favour of the Automatic Theory**

Notwithstanding the above critique from the standpoint of the interplay between remedies and rights, there are a number of compelling doctrinal and practical reasons why one might argue that the automatic theory of termination ought to be preferred. First, in doctrinal terms, the elective theory of termination does not sit well with the common law principle that an employee cannot compel his employer to give him work, any more than his employer can compel him to work: by definition, the application of the elective theory forces the employer to continue providing work or wages to the employee against its will if the employee affirms the contract. Logic dictates that such affirmation would naturally entitle the employee to the continued payment of wages as a debt, rather than as damages, with an attendant duty to mitigate loss imposed on the employee, for example by securing fresh employment.<sup>27</sup> However, that is not the prevailing legal position, since the courts have decided that the employee has no entitlement to the continued payment of wages after the outright dismissal. Instead, the employee is restricted to an award of damages in the absence of special circumstances.<sup>28</sup>

The second argument in favour of the automatic theory is related to the first and concerns the interplay between work and wages. It is contended that the law's preclusion of a claim for wages as a debt subsequent to an outright wrongful dismissal demonstrates that the common law recognises that the employee is denied the opportunity to work for the employer and thus the notion that the employee may affirm the contract is misconceived. As Shaw LJ pointed out in *Gunton*:

The servant who is wrongfully dismissed cannot claim his wage for services he is not given the opportunity of rendering; and the master whose servant refuses to serve him cannot compel that servant to perform his contracted duties.<sup>29</sup>

A final argument in favour of the automatic theory of termination is also doctrinal and lies in the fact that the failure to apply the automatic theory would lead to a rupture with the approach adopted in the case of the statutory unfair dismissal regime. For example, in *Robert Cort & Son Ltd v Charman*,<sup>30</sup> citing the need for certainty, the EAT departed from the common law position and held that the



automatic theory was applicable as regards the statutory concept of the ‘effective date of termination’ (‘EDT’) in section 97 of the ERA. Therefore, irrespective of whether the employee is entitled to accept the employer’s repudiatory dismissal or affirm the contract at common law or not, the EAT ruled that the date of an employee’s summary dismissal would be treated as the EDT for statutory purposes. Whilst superficially attractive, this argument from the perspective of maintaining doctrinal coherence across the field of employment law (that is, common law and statutory rights) is arguably illusory. First, there are ample examples of the judiciary crafting a distinction between the rules applicable for statutory employment protection purposes and at common law, the most high profile of which is the recent decision of the Supreme Court in *Gisda Cyf v Barratt*.<sup>31</sup> Here, the Supreme Court departed from common law principles when it held that the date a letter dismissing an employee without notice took effect for the purposes of the statutory unfair dismissal regime<sup>32</sup> was when the employee had actually read the letter or had had a reasonable chance of finding out that he/she had been dismissed. This contrasted with the common law position where the letter would have taken effect once it had been despatched. Secondly, the argument in favour of doctrinal coherence breaks down to the extent that the statutory unfair dismissal regime does not systematically apply the automatic theory of termination itself. The paradigm is the law of statutory constructive dismissal where the elective theory applies: here, it is trite law that an employee cannot claim that he/she has been constructively dismissed under section 95(1)(c) unless he/she has accepted an employer’s repudiatory breach of contract.<sup>33</sup>

### **C. A Critique of the Automatic Theory**

This takes us on neatly to the various critiques of the automatic theory. Proponents of the elective theory invoke persuasive policy reasons in its favour. First, in the absence of voluntary acquiescence on the part of the employee, the fact that the automatic theory affords the employer a right to bring its contractual obligations to an end at a moment’s notice is treated as a proposition which is ethically unappealing and contrary to good policy. The underlying principle here is that the employer should not be entitled to profit from its wrong<sup>34</sup> or benefit from the avoidance of any unfair impact or effects its repudiatory breach might cause. Secondly, advocates of the elective theory find it objectionable

that the automatic theory denies the innocent party the choice of affirming the contract and continuing with it if he/she wishes to do so. By disempowering the employee from responding in some way to the employer's repudiatory breach, the automatic theory undermines the central importance of mutuality and reciprocity inherent within the common law of the contract of employment. Thirdly, although some of the pre-Gunton authorities appear to suggest that the elective theory of termination is inapplicable in the case of an outright wrongful dismissal and the House of Lords expressly reserved its opinion on the matter in *Rigby v Ferodo Ltd*,<sup>35</sup> it is argued that the decisions of the Court of Appeal in *Gunton v Richmond Upon Thames*,<sup>36</sup> *Boyo v London Borough of Lambeth*<sup>37</sup> and *Soares v Beazer Investments Ltd*<sup>38</sup> all point towards the application of the elective theory as a general rule in the case of contracts of service. Indeed, one might argue that it is counterintuitive to argue that the elective theory applies in less serious cases of repudiatory breach short of dismissal, but that it has no application in the context of the more 'extreme case' of wrongful dismissal.<sup>39</sup> Furthermore, unless one can identify something peculiar about the mechanics of the termination of the contract of employment, it is not wholly clear why it should be singled out and treated any differently from the termination of other contracts. On this basis, the elective theory should be applied consistently across the whole of the law of contract.

#### **4. TOWARDS A SOLUTION**

Although the balance of the case law suggests that the elective theory is preferred over the automatic theory, the application by the judiciary of what has been referred to as the 'restrictive approach' towards the elective theory of termination demonstrates that its position is far from assured.<sup>40</sup> Its ascendant position is somewhat precarious, and in its practical operation, it is nothing short of a hollow concept. The insecurity of its status is demonstrated by its begrudging acceptance in the decisions of the Court of Appeal in *Boyo v LB of Lambeth*<sup>41</sup> and *Société Générale London Branch v Geys*.<sup>42</sup> Meanwhile, its hollow nature is revealed by the frequency with which the common law courts have failed to take the application of the concept to its logical conclusion. First, in *Gunton*, the elective theory was applied in an attenuated manner so that it was harnessed to notionally, rather than

actually, prolong the duration of the contract of employment. The Court of Appeal held that while the duration of the contract of employment was extended, this was merely a notional prolongation for the purposes of calculating the damages awarded to the employee. What was not permissible was the actual extension and enforcement of the contract of employment via the award of specific remedies. Secondly, the Court of Appeal in *Gunton* marginalised the effectiveness of the very concept which it had endorsed by ruling that although the elective theory would be applied, employees faced with a wrongful dismissal would be deemed to have readily accepted the employer's repudiation. Indeed, it is when we come to the interaction between the common law rules on termination and the statutory unfair dismissal regime that the marginalisation of the elective theory becomes even more striking. For example, as we noted above, in *Robert Cort & Son Ltd v Charman*,<sup>43</sup> the EAT departed from the common law position and held that the automatic theory was applicable as regards the statutory concept of the 'effective date of termination' in section 97 of the ERA.

Writing in 1993, Ewing remarked that the 'automatic' versus 'elective' debate was a matter which is crying out for urgent attention'.<sup>44</sup> Therefore, it is to be welcomed that the Supreme Court will finally have the opportunity to settle the debate regarding the viability of the automatic and elective theories of termination of the employment contract when it hears the case of *Geys*. One option would be for the Supreme Court to confine the application of the automatic theory to the statutory unfair dismissal scheme, whilst continuing to apply the elective theory in the case of the common law. For the same reasons advanced above, it is suggested that any concerns about the impact of such an approach on the doctrinal coherence of labour law are misguided. Secondly, the Supreme Court is by no means limited to making a straight choice between the automatic theory and the current, somewhat formal and restricted incarnation of the elective theory of termination as elaborated in *Gunton* and *Boyo*. Instead, as Ewing has advocated, the Supreme Court could adopt a genuine form of the elective theory, whereby an 'employee dismissed in breach of a substantive or procedural term of his or her contract or, in the absence of such a provision, without notice, could elect either to accept the repudiation and sue for damages (however they may be calculated where there is no power to dismiss) or to keep the contract alive by seeking some form of equitable relief, most likely an injunction'.<sup>45</sup>

Preference for such a genuine form of the elective theory was also acknowledged by Lord Justice Gibson in *Boyo* despite the Court being bound by the prior decision in *Gunton*:

[I]f there is a requirement of law for acceptance by the servant of the repudiation by the master, I am unable to see why it is not a requirement for a real acceptance, that is to say a conscious acceptance intending to bring the contract to an end or the doing of some act which is inconsistent with continuation of the contract. If that is right, I do not understand how the courts would apply the notion of 'easily inferring that the innocent party has accepted...the repudiation'. Further, I do not understand why the taking of employment should automatically constitute acceptance. If I tell my employer, who has in breach of contract refused to let me do my work, that I do not accept his repudiation; and that I shall get another job but remain willing and able to do my work when sent for by him; why should I be treated as having accepted what I have not accepted?<sup>46</sup>

In a similar vein, Brodie argues that 'the employment contract either constitutes an exception to the general rule or it does not. If it does not, the normal contractual rules on acceptance should apply.'<sup>47</sup> Even though there may be a number of practical arguments which can be put forward in favour of the automatic theory of termination, it is submitted that its adoption would create more problems than it would solve. Further, the option of recognising the current incarnation of the elective theory in *Gunton* with its legal fiction of 'readily inferred acceptance' is also particularly unattractive. The adoption by the Supreme Court of a genuine form of the elective theory would therefore be a positive development and shed much-needed light on the implications of a repudiatory breach for the termination of the employment contract. At a much more abstract and conceptual level, it would amount to further judicial recognition of the fact that the contract of employment is reciprocal in its orientation and that the law ought to evolve 'beyond exchange'<sup>48</sup> to reflect the relational nature<sup>49</sup> of the contract of employment.<sup>50</sup> The modern conceptualisation of the workplace as a community<sup>51</sup> providing an employee with a level of self-esteem and a source of personal and social fulfilment is such that employment is now much more than a simple exchange of work for wages and instead encompasses a long-term, continuous relationship with the employer. As Deakin and Morris argue, 'to

deny the application of the elective theory would be to deny the fundamentally reciprocal nature of the parties' obligations under the individual contract of employment, and to return to a more hierarchical, master-servant model of the employment relationship.'<sup>52</sup>

## **Acknowledgments**

We are grateful to Professor Douglas Brodie, University of Stirling, for reviewing and commenting upon earlier drafts. The usual disclaimer applies.

## **Footnotes**

**1** White and Carter (Councils) Ltd. v McGregor [1962] AC 413.

**2** Société Générale, London Branch v Geys [2011] EWCA Civ 307; [2011] IRLR 482.

**3** This has been attributed to the statutory wording of ss 95 and 97 of the ERA which assume that the employer's dismissal is effective to unilaterally bring the contract of employment to an end.

**4** An interdict decree is the Scottish equivalent of injunctive relief.

**5** [1981] 1 Ch 448.

**6** [1994] ICR 727.

**7** [2011] EWCA Civ 307; [2011] IRLR 482, at [17].

**8** [2011] EWCA Civ 307; [2011] IRLR 482, at [18].

**9** See Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2011] UKSC 58; [2012] 2 WLR 55, 88B per Baroness Hale.

**10** For example, Rigby v Ferodo Ltd. [1987] IRLR 516.

**11** P. Elias, B. Napier and P. Wallington, Labour Law: Cases and Materials (London: Butterworths, 1980) 492-3; M. Freedland, The Personal Employment Contract (Oxford: Oxford University Press, 2003) 368-96. The difficulty with which the concept of 'dismissal' can be reconciled with the notion of the 'termination of the contract of employment' at common law is largely attributable to the former being a vestige of the now obsolete 'master and servant' law. The concept of 'dismissal' developed in the common law prior to the emergence of the current contractual framework for the employment relationship: *Ibid.*, 294.

**12** Francis v Municipal Councillors of Kuala Lumpur [1962] 1 WLR 1411, 1417 per Lord Morris of Borth-Y-Gest; Denmark Productions Ltd. v Boscobel Productions Ltd. [1969] 1 QB 699, 737E-F per Harman LJ; Decro-Wall International S.A. v Practitioners in Marketing Ltd. [1971] 1 WLR 361, 381 per Buckley LJ; Vine v National Dock Labour Board [1957] AC 488, 500 per Viscount Kilmuir L.C.; Sanders v Ernest A Neale Ltd. [1974] 3 All ER 327, 333 per Sir John Donaldson P.

**13** [1994] ICR 727, 743B-D per Ralph Gibson LJ.

**14** [1988] ICR 29.

**15** [1988] ICR 29, 35B.

**16** See J. McMullen, 'A Synthesis of the Mode of Termination of Contracts of Employment' (1982) 41 Cambridge Law Journal 110, 140; K. Ewing, 'Remedies for Breach of the Contract of Employment' (1993) 52 Cambridge Law Journal 405, 411; S. Deakin and G. Morris, *Labour Law*, 5th edn (Oxford: Hart Publishing, 2012) 451-2.

**17** J. McMullen, 'A Synthesis of the Mode of Termination of Contracts of Employment' (1982) 41 Cambridge Law Journal 110, 122-3.

**18** *De Francesco v Barnum* (1890) 45 Ch D 430, 438 (Fry LJ); *Ridge v Baldwin* [1964] AC 40, 65 per Lord Reid; *Wilson v St. Helen's Borough Council* [1999] 2 AC 52, 84A-B per Lord Slynn of Hadley.

**19** K. Ewing, 'Remedies for Breach of the Contract of Employment' (1993) 52 Cambridge Law Journal 405, 410-11.

**20** See D. Brodie, 'Specific Performance and Employment Contracts' (1998) 27 ILJ 37, 39-44.

**21** See *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116; *CH Giles & Co Ltd v Morris* [1972] 1 All ER 960, 967j-970d per Megarry J.

**22** See *Mezey v South West London & St George's Mental Health NHS Trust* [2010] IRLR 512 (cf *Lakshmi v Mid Cheshire Hospitals NHS Trust* [2008] IRLR 956); *Lew v Board of Trustees on behalf of United Synagogue* [2011] EWHC 1265 (QB), [2011] IRLR 664; *Michael Kircher v Hillingdon Primary Care Trust* [2006] EWHC 21 (QB), [2006] Lloyd's Rep. Med. 215 (unreported); *Gryf-Lowczowski v Hinchingsbrooke Healthcare NHS Trust* [2005] EWHC 2407; [2006] ICR 425; [2006] IRLR 100; *Anderson v Pringle* [1998] IRLR 64 (cf. *Alexander v Standard Telephones and Cables Ltd.* [1990] IRLR 55); *Peace v City of Edinburgh Council* 1999 SLT 712. For a wide-ranging review of the authorities, see L. Barmes, 'Remedying Workplace Harassment' (2002) 55 *Current Legal Problems* 347, 354-64.

**23** See M. Freedland, *The Personal Employment Contract* (Oxford: Oxford University Press, 2003) 355-68, where it is argued that a number of factors operate in conjunction to limit the amount of damages available to the employee, namely the restrictive rules on (1) damages for injury to the employee's feelings, and loss of employability, (2) the duty of mitigation of loss and (3) damages for loss of predicted benefits or the chances of benefits.

**24** [2011] UKSC 58; [2012] 2WLR 55.

**25** D. Brodie, *The Contract of Employment* (Edinburgh: Thomson/W. Green, Scottish Universities Law Institute, 2008) 197.

**26** *Church Commissioners for England v Abbey National plc* 1994 SC 651; *Anderson v Pringle* [1998] IRLR 64; and *Peace v City of Edinburgh Council* 1999 SLT 712.

**27** On this point, see P. Elias, 'The Structure of the Employment Contract' (1982) 35 *Current Legal Problems* 95, 98-106.

**28** *Boyo v LB of Lambeth* [1994] ICR 727; *Cerberus Software Ltd. v Rowley* [2001] EWCA Civ 78; [2001] ICR 376.

**29** *Gunton v Richmond-upon-Thames London Borough Council* [1980] I.C.R. 755 at [763].

**30** [1981] ICR 816. The Court of Appeal reached similar decisions in *Octavius Atkinson & Sons v Morris* [1989] ICR 431 and *Stapp v The Shaftesbury Society* [1982] IRLR 326 (CA). See R. White, 'Repudiatory Breach and the Definition of Dismissal' (1997) 26 ILJ 252, 255-57.

**31** [2010] UKSC 41; [2010] 4 All ER 851. cf S. Anderman, 'The Interpretation of Protective Employment Statutes and Contracts of Employment' (2000) 29 ILJ 223.

**32** Section 97(1)(b) of the ERA.

**33** *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761; *WE Cox Toner (International) Ltd v Crook* [1981] ICR 823.

**34** In the sense that the employer would be able to unilaterally terminate the contract on a whim.

**35** [1987] IRLR 516.

**36** [1981] Ch 448,

**37** [1994] ICR 727, 743B-D per Ralph Gibson LJ. Compare the approach of LJ Kay in *Soares v Beazer Investments Ltd* [2004] EWCA Civ 482 at [26].

**38** [2004] EWCA Civ 482.

**39** K. Ewing, 'Remedies for Breach of the Contract of Employment' (1993) 52 *Cambridge Law Journal* 405, 413-14.

**40** M. Freedland, *The Personal Employment Contract* (Oxford: Oxford University Press, 2003) 379-84.

**41** [1994] ICR 727.

**42** [2011] IRLR 482, 486-487 at [17]-[19] per Rimer LJ.

**43** [1981] ICR 816. See R. White, 'Repudiatory Breach and the Definition of Dismissal' (1997) 26 *ILJ* 252, 255-57.

**44** K. Ewing, 'Remedies for Breach of the Contract of Employment' (1993) 52 *Cambridge Law Journal* 405, 414.

**45** *Ibid.*, 405, 415.

**46** [1994] ICR 727 at 743.

**47** D. Brodie, *The Contract of Employment* (Edinburgh: Thomson/W Green, Scottish Universities Law Institute, 2008) 199.

**48** D. Brodie, 'Beyond Exchange: the New Contract of Employment' (1998) 27 *ILJ* 79; D. Brodie, 'Legal Coherence and the Employment Revolution' (2001) 117 *Law Quarterly Review* 604.

**49** *Johnson v Unisys Ltd* [2003] 1 AC 518, 532F per Lord Steyn.

**50** D. Brodie, 'How Relational is the Employment Contract?' (2011) 40 *ILJ* 232.

**51** D. Brodie, 'Mutual Trust and the Values of the Employment Contract' (2001) 30 *ILJ* 84, 88-9; A. Bogg, 'Good Faith in the Contract of Employment: A Case of the English Reserve?' (2011) 32 *Comparative Labor Law and Policy Journal* 729.

**52** Deakin and Morris, *Labour Law*, n 16 above, at 450.